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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~452.~~ 220

THE UNITED STATES, APPELLANTS,

vs.

JOHN H. RUSSELL.

APPEAL FROM THE COURT OF CLAIMS.

FILED MAY 5, 1870.



SUPREME COURT OF THE UNITED STATES.

No. 452.

THE UNITED STATES, APPELLANTS,

vs.

JOHN H. RUSSELL.

APPEAL FROM THE COURT OF CLAIMS.

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1 *Petition.*

United States Court of Claims.—December term, A. D. 1867.

JOHN H. RUSSELL
vs.
THE UNITED STATES. } No.

To the honorable the United States Court of Claims:

Your petitioner, John H. Russell, respectfully represents that he is now, and has been for many years past, a citizen of the United States, resident in Adrian, in the State of Michigan; and that he claims of the United States the sum of one hundred and eleven thousand eight hundred and fifty-nine dollars and thirty-three cents, which he alleges to be due him from the said defendant.

And for cause of such claim your petitioner states:

COUNT I.—That in the month of August, 1863, and prior thereto, your petitioner was then the sole owner of a steamboat named the "J. H. Russell," a side-wheel steamer engaged in the navigation of the Mississippi River and its tributaries, of over five hundred tons measurement, and capable of carrying over seven hundred tons, and one hundred and fifty cabin passengers; that said boat had two decks, and was about two hundred and twenty-five feet in length, and forty-two feet in width, with two engines, and twenty-two-inch cylinders of seven-feet stroke; that she had four boilers, twenty-two feet long, and was of draught three and a half feet light; and at the time above stated, she was

2 a new boat, and of the value of one hundred thousand dollars.

That on or about the 8th day of August, 1863, your petitioner, with said steamer, and in command thereof, left the city of New Orleans for the city of Saint Louis, in the State of Missouri, for the purpose of securing down freight and passengers for the said city of New Orleans; that on the arrival of said steamer at St. Louis, private freights from that city to New Orleans were rating at from one dollar and twenty-five cents to one dollar and fifty cents per one hundred pounds; and that your petitioner was about contracting for a full load for said steamer at those rates, when, on or about the 8th day of September, 1863, the said steamer was seized and impressed into the service of the United States, by Charles Parsons, captain and assistant quartermaster, then in charge of river transportation at said city of St. Louis. That the said Parsons loaded the said steamer with government freight, and ordered your petitioner, the captain and owner thereof, to proceed to the city of New Orleans therewith; and that your petitioner, in obedience to said orders, proceeded to the said city of New Orleans, with said freight, where he arrived on or about the 24th day of September, 1863, and discharged the said freight. That the said quartermaster, Captain Parsons, would only allow and pay for the said freight, the sum of thirty-seven and one-half cents per one hundred pounds, which was much below the price of private freights, and that your petitioner was allowed by said Parsons, on account of the said freight on said trip, only the sum of twenty-seven hundred dollars. That your petitioner, from the time of said impressment of said steamer, on or about the 8th day of September, up to the time of the delivery of the said government freight at the city of New Orleans, victualled, manned, and paid all the expenses of said steamer; that the expenses of running the said steamboat amounted to four hundred and thirty dollars per day; that the services of said boat were worth seven hundred and fifty dollars per day;

and that the expenses of victualling, manning, and other expenses of said boat exceeded the amount allowed your petitioner in the sum of ten thousand dollars. That at the time of loading said steamer
3 as aforesaid, there was but an ordinary stage of water in the Mississippi River; that the said quartermaster overloaded the said boat, against the strong remonstrances of your petitioner, and compelled your petitioner to proceed on said trip, giving to your petitioner an order to call for assistance in case of grounding, on any boat in the government service. That your petitioner proceeded on said trip with much difficulty, and succeeded in avoiding any serious obstructions until he reached the bar known as the Phillips Bar, seven miles above Island No. 10, where his overloaded boat grounded, and remained aground for the period of four days. That your petitioner called on the steamer "David Tatum," which was then in the government employ, which boat assisted the said steamer "J. H. Russell" off the bar; and that subsequently the said steamer "David Tatum," by order of the officer in command at Island No. 10, accompanied the boat of your petitioner to Memphis and carried a portion of the said freight. That the said "David Tatum" claimed of your petitioner the sum of twenty-five hundred dollars for the assistance rendered the said "J. H. Russell," in lightening her off the said bar, and carrying a portion of her freight to Memphis; that this said sum was deducted by the said Captain Parsons from the said sum of twenty-seven hundred dollars allowed your petitioner for said trip, and paid by said Parsons to the owners of the said "David Tatum" against the remonstrances of your petitioner; and that, in fact, your petitioner only received for said trip the sum of two hundred dollars. That in consequence of the overloading and grounding of his said boat, as hereinbefore stated, she was badly strained, warped, hogged, twisted out of shape, and sprung a leak; that on her arrival at the city of New Orleans, she had to have a side dock put under her, so that she could be repaired; that she had to have extensive repairs before your petitioner could do any more business with her; that after being repaired the said boat remained out of shape, thus impairing her value; and that the cost of said repairs, and the damages to said boat resulting from the overloading as aforesaid, amount to the sum of ten thousand dol-
4 lars. And your petitioner here avers that by the seizure and impressment of the said steamer, and the overloading thereof, as hereinbefore stated, the United States became liable to pay your petitioner what the said boat was reasonably worth for the services rendered and all damages caused to your petitioner by said seizure and overloading thereof; and your petitioner further avers that the said services were reasonably worth the sum of thirty thousand six hundred and twenty-five dollars, and the damages to your petitioner in consequence of the seizure and overloading of said boat, amount to the sum of ten thousand dollars.

COUNT II.—And for further cause of such claim, your petitioner states that being still the sole owner of the said steamer "J. H. Russell," a steamer engaged in the navigation of the Mississippi River and the tributaries thereof, he proceeded from the said city of New Orleans to St. Louis, in the State of Missouri, for the purpose of loading said boat with down freight, at which place he arrived with the said steamer on or about the 16th day of October, 1863; that he found private freights rating at about three dollars per one hundred pounds to the [the] said city of New Orleans; and that he had an opportunity to immediately load his said boat at those rates. That on or about the said 16th of October, 1863, the said Captain Charles Parsons, ass't Q. M. aforesaid, again seized the said

boat "J. H. Russell," impressed her into the government service, and, against the remonstrances of your petitioner, again loaded the said boat with government freight for Vicksburg and New Orleans. That the said boat was detained at the city of St. Louis for some sixteen or seventeen days by the said quartermaster, awaiting orders, so that she did not leave St. Louis till after the 1st day of November, 1863; that the said boat arrived at New Orleans on or about the 13th of said month, where she discharged her said freight; that your petitioner victualled, manned, and paid all the expenses of said boat, from the time of her arrival and seizure last aforesaid at St. Louis, till her return to and discharge at New Orleans; that the cost of running said boat was four hun-
5 dred and thirty dollars per day; that the services of said boat, including the said daily expenses, were reasonably worth the sum of seven hundred and fifty dollars per day; and that by the boat being impressed into the service of the United States, and your petitioner deprived of the privilege of carrying private freight, he having made a contract for a full load of such freight, at about three dollars per one hundred pounds, your petitioner was damaged in the sum of thirty thousand nine hundred and seventy-nine dollars. That your petitioner received from the said Captain Parsons, A. Q. M., on account of the said trip, as near as he can now state, the sum of two thousand three hundred and ninety-five dollars and sixty-seven cents, which sum was received by the agents of your petitioner under protest; and that the sum above mentioned is all that he ever received from the government on account of said trips. And your petitioner here avers that by the said seizure and impressment of the said steamer, the United States became liable to pay your petitioner what the said boat was reasonably worth for the services rendered, and the damages he has suffered by reason of the said seizure; and your petitioner further avers that the said boat was reasonably worth, while so impressed and seized, the sum of seven hundred and fifty dollars per day, and that he has been damaged thereby to the amount of thirty thousand nine hundred and seventy-nine dollars.

COUNT III.—And for further cause of said claim, your petitioner states that on the 1st of September, 1864, and during the time hereinafter mentioned, he was sole owner and captain of a stern-wheel steamer, called the "Liberty," then engaged in navigating the Mississippi River and its tributaries; that she was a freight and passenger boat, of about six hundred tons burden, and of the value of thirty-five thousand dollars; and that on the 2d day of September, in said year, she was seized and impressed into the government service at St. Louis, by L. S. Metcalf, assistant quartermaster U. S. A., against the remonstrances of your petitioner. That said boat was loaded with quarter-
master and commissary stores by the government, and your peti-
6 tioner was verbally ordered by the said Metcalf to proceed from said city of St. Louis to Duvall's Bluff, on White River, and to take in tow two barges, also laden with stores and one field battery for the army. That in obedience to said orders, the said steamer "Liberty" left Saint Louis to make said trips on the 5th day of September, 1864; that at this time the water in the Mississippi River was low, and in consequence of the boat and the barges being overloaded, the said boat and barges grounded several times between St. Louis and Cairo, by which said steamer was delayed, and your petitioner put to great expense; that when said steamer with the barges reached the mouth of White River, there was only about three feet two inches of water in the channel of said river, the said boat and barges drawing over four and a half

feet of water. That your petitioner protested to Capt. Norcross, quartermaster, at the mouth of White River, against proceeding up said river with the load on the boat and the two barges in tow, in consequence of the low stage of the water; and that the said Norcross compelled your petitioner to proceed up said river with said steamer and the two barges, after taking off a portion of the freight. That after being thus lightened, the said steamer still drew too much water, so that it required five days to make the trip from the mouth of White River to Duvall's Bluff and back; and that on her return to the mouth of said river, the said "Liberty" proceeded to New Orleans. That the said steamer, from the time she was impressed into the government service, as above stated, at Saint Louis, until her arrival at New Orleans, was employed in said service twenty-six days; that the running expenses of said steamer were three hundred dollars per day, all of which were paid by your petitioner; that the use of said steamer was reasonably worth the sum of one hundred and fifty dollars per day, over and above said running expenses; and that your petitioner received for said trip from the United States, the sum of eighteen hundred dollars, and this is all he ever received for said service. That in consequence of said steamer and barges being greatly overloaded by the said quartermaster, against the remonstrances
7 of your petitioner, in making said trip the said boat was badly strained and otherwise injured, to the damage of your petitioner in the sum of four thousand dollars. And your petitioner here avers, that by the said seizure and impressment of the said steamer "Liberty," and the overloading of the same, the said United States became liable to pay your petitioner for the use of the said steamer, what her said services were reasonably worth, and all damages accruing to him by reason of such seizure; and your petitioner further avers, that the said steamer was reasonably worth, while thus engaged in the public service, the sum of five hundred dollars per day; that he was damaged by the said seizure of the said boat in the sum of four thousand dollars; and that there is now due him from the United States, on account thereof, the sum of thirteen thousand nine hundred dollars.

COUNT IV.—And for further cause of such claim your petitioner states that from the 1st day of May, 1865, up to the 16th day of July, 1865, he was the sole owner of the steamer "Liberty," a stern-wheel boat, engaged in the navigation of the Mississippi River; that on said 1st day of May, 1865, the said steamer was seized at New Orleans and impressed into the government service, and retained in such service until the 16th day of July, 1865, by orders of Capt. F. W. Perkins, A. Q. M., and Capt. G. A. Norton, A. Q. M., and, while thus impressed, the said steamer was kept constantly employed in said service in and about New Orleans and the Red River; that the running expenses of said boat, while thus employed, were paid by the government; that the use of said boat, while thus employed in said service, was reasonably worth, over and above expenses, the sum of one hundred and fifty dollars per day; and that your petitioner received for the services of said steamer, while thus employed in the government service, the sum of eighty dollars per day, making the sum of six thousand one hundred and sixty dollars. And your petitioner here avers that by the said seizure and impressment of the said steamer, the said Unted States became liable to pay your petitioner what the said services of the said boat were rea-
8 sonably worth; and your petitioner further avers that the use of said steamer was reasonably worth the sum of one hundred and fifty dollars per day, and there is now due him from the United States on account thereof, the sum of five thousand three hundred and ninety dollars.

COUNT V.—And for further cause of such claim your petitioner states that heretofore, that is to say, from the 21st day of March, 1864, to the 27th day of May, 1864, he was the sole owner of a steamer called the "Time and Tide," a light-draft steam-wheel boat, engaged in running from New Orleans to Natchez and Waterproof, on the Mississippi River, as a regular packet; that she was a boat of about one hundred and fifty tons measurement, and could carry about four hundred and fifty tons; that she was one hundred and fifty-four feet in length, and thirty-one feet beam, with two decks, two boilers, twelve-and-a-half-inch cylinder, with four-and-a-half-foot stroke; and that she was well adapted to carrying freight and passengers, and especially valuable as a light-draft boat. That on the said 21st day of March, 1864, the said steamer was seized and impressed into the service of the United States at New Orleans, by Lt. Col. S. B. Holabird, chief quartermaster Department of the Gulf, and so retained in said service until the 31st day of said month of March, when she was returned to your petitioner; that on the 8th day of April, 1864, the said steamer was again seized and impressed into said service of the United States by the said Lt. Col. Holabird, and retained therein until the 27th day of May, 1864, when she was destroyed by fire at the levee at New Orleans; and that after she was seized the second time she was used as an ammunition or magazine boat, and was loaded with ammunition at the time she was destroyed. That the said steamer, while thus employed, was reasonably worth one hundred and fifty dollars per day, over and above her running expenses; that for the sixty days covered by the two seizures herein specified, the said Lt. Col. Holabird only allowed your petitioner the sum of fifty dollars per day, making the sum of three thousand dollars, which your petitioner received under protest; and that this sum is all that he
9 ever received from the United States for the use of the said steamer for the said sixty days. That at the time of said last-mentioned seizure, and prior thereto, the steamer "Time and Tide" was running as a regular packet-boat between New Orleans and Natchez, Miss., making weekly trips; that on each of said trips the said steamer realized to your petitioner, clear of all expenses, the sum of from four to five thousand dollars; and that by the said seizure of said steamer the business of your petitioner was entirely broken up, to his damage in the sum of fifteen thousand dollars. And your petitioner here avers that by the said seizures and impressment of the said steamer, the United States became liable to pay your petitioner what the services of the said steamer were reasonably worth, and any damages accruing to him by reason of such seizure; and your petitioner further avers that the services of the said steamer for the said sixty days were reasonably worth one hundred and fifty dollars per day; that his damages, by reason of the said seizures, amount to the sum of fifteen thousand dollars; and that there is now due to him from the United States, on account thereof, the sum of twenty-one thousand dollars.

Your petitioner further represents that the claim herein made has been duly presented for allowance to the Quartermaster General of the United States, and that the same has been disallowed by that department.

And your petitioner further represents that he has at all times borne true allegiance to the government of the United States, and that he has not in any way voluntarily aided, abetted, or given encouragement to the late rebellion against the said government.

Wherefore, and in consideration of the premises, your petitioner prays judgment for the said sum of one hundred and eleven thousand eight

hundred and fifty-nine dollars and thirty-three cents, the amount above claimed.

COOLEY & CLARKE,
Sol'rs for Claimant.

10 DISTRICT OF COLUMBIA, *County of Washington, ss:*

I, John H. Russell, of lawful age, being duly sworn, depose and say that I am the claimant named in the foregoing petition; that no assignment or transfer of said claim, or any part thereof, or any interest therein, has been made; that I am the sole owner thereof; that I am justly entitled to the amount therein claimed from the United States, after allowing all just claims and set-offs; and that I believe the facts stated in said petition to be true.

JOHN H. RUSSELL.

Subscribed and sworn to before me, a notary public in and for said district, by the said John H. Russell, on this 16th day of October, 1867, as witness my hand and seal notarial.

THOS. J. MYERS,
Notary Public.

P. O. address of claimant, Washington City.
P. O. address of counsel, Do. Do.

11 In the United States Court of Claims.—December term, A. D. 1867.

JOHN H. RUSSELL
vs.
THE UNITED STATES. } 2928.

And the said defendants, by John J. Weed, their solicitor, come and make answer to the petition of the claimant on file herein; and, not confessing the same, or any part thereof, do hereby most expressly deny each and every the allegations therein contained, and call for strict proof of the same.

And as to so much of said petition as sets forth and avers that the United States are indebted to said claimant in the sum of one hundred and eleven thousand eight hundred and fifty-nine dollars & thirty-three cents, the defendants say that they are not indebted to said claimant in said sum of money, nor any part thereof.

And as to so much of said petition as avers that the said claimant has at all time borne true faith and allegiance to the government of the United States, and never voluntarily aided, abetted, or given encouragement to rebellion against said government, the said defendants deny the truth of said allegation, and call for proof thereof.

JOHN J. WEED,
Ass't Solicitor for the United States.

12 In the Court of Claims.

JOHN H. RUSSELL
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THE UNITED STATES. } 2928.

And now, to wit, 6th of December, A. D. 1869, the court, upon the

consideration of the premises, find in favor of the claimant, and do order, adjudge, and decree that the said John H. Russell, claimant, have and recover of and from the United States the sum of forty-one thousand three hundred & fifty-five dollars thirty-three cents, ($41,355 33.)

By the Court.

13 In the Court of Claims.—Dec. term, 1869.

JOHN H. RUSSELL
vs.
THE UNITED STATES. } 2928.

From the judgment rendered in the above-entitled cause, on Dec. 6, 1869, in favor of the claimant, the defendants, by their Attorney General, on this 15th of February, 1870, make application for and give notice of an appeal to the Supreme Court of the United Sates, the amount therein exceeding three thousand dollars.

By the Ass't Att'y General:

THOMAS H. TALBOT.

Filed Feb'y 15, 1870.

Ordered, That the appeal prayed for in the cause of John H. Russell vs. the United States, No. 2928, be allowed.

By the court.

FEBRUARY 16, 1870.

14 JOHN H. RUSSELL
vs.
THE UNITED STATES. } No. 2928.

Findings of facts in the case and the conclusions of law on which the court founded its judgment.

I. That the claimant was a loyal citizen of the State of Michigan during the late rebellion, and was the owner of the side-wheel steamer "J. H. Russell," of about five hundred tons capacity; and that on the 8th day September, A. D. 1863, said steamer being at the port of St. Louis, in the State of Missouri, in command of the claimant, and being about to take on board a cargo of private freight, the claimant was notified by Capt. Parsons, an assistant quartermaster of the United States Army, in charge of river transportation at St. Louis, Missouri, through a madatory order issued by him, that the United States required the services of said steamer, for the purpose of transporting freight for the
15 United States. That thereupon, under the direction of said assistant quartermaster, said steamer was laden with freight belonging to the United States, and despatched thence to New Orleans, Louisiana, and that said steamer continued in this service until 25th day of September, 1863, a period of seventeen days.

That on the 2nd day of October, A. D. 1863, said steamer being at the port of St. Louis, in the State of Missouri, in command of the claimant, he received from Capt. Parsons, an assistant quartermaster of the United States army, in charge of river transportation at St. Louis, Missouri, an order in the words and figures following, to wit:

"ST. LOUIS, *Oct.* 2, 1863.

"CAPT. OF ST'R 'J. H. RUSSELL.'

"SIR: Imperative military necessity requires that you make no arrange-

ments for private freight without first consulting this office, and obtain permission in writing so to do.

"Very respectfully,

"CHARLES PARSONS,
"*Capt. and A. Q. M.*"

That in obedience to this order the claimant made no attempt to secure private freight, and the said steamer was detained in the service
16 of the United States in pursuance of this order, being used in the transportation of government freight, from said 2nd day of October, 1863, until the 20th day of November, 1863, a period of fifty days, making the whole number of days said steamer was in the service of the United States, as above stated, sixty-seven.

That during the whole of such service said steamer was supplied with a full complement of hands, who were paid by the claimant, and the other expenses of runing said steamer during such service was paid by the claimant.

That in part payment for the services of said steamer rendered as aforesaid, the claimant received from the United States the sum of five thousand and ninety-four dollars and sixty-seven cents; that the services of said steamer for the time she was engaged in such service—taking into consideration that all the expenses of runing said
17 steamer during said service were paid by the claimant—were reasonably worth the sum of thirty-three thousand eight hundred dollars.

II. That the claimant was the owner of the steamer "Liberty," and that on the 2nd day of September, A. D. 1864, said steamer being at the port of St. Louis, in the State of Missouri, in command of the claimant, he received from Capt. Metcalf, an assistant quartermaster in the United States Army, an order in the words and figures following, to wit:

"TRANSPORTATION DEPARTMENT,
"*St. Louis, Mo., Sept. 2nd*, 1864.

"CAPTAIN OF THE STEAMER 'LIBERTY.'

"SIR: Imperative military necessity requires the services of your steamer for a brief period. Your captain will report at this office at once, in person, first stopping the receipt of freight, should the steamer be so doing.

"L. S. METCALF,
"*Capt. and A. Q. M.*"

In pursuance of this order, said steamer was taken into the
18 service of the United States, and despatched thence, loaded with freight belonging to the United States, to Duvall's Bluff, in the State of Arkansas, and up White River. That said steamer was engaged in this service twenty-six days, during which time all the expenses of runing said steamer were paid by the claimant; and that there was paid to the claimant, by the United States, on account of this service of said steamer, the sum of eighteen hundred dollars.

That the services of said steamer for this service were reasonably worth the sum of ten thousand four hundred dollars.

That subsequently said steamer was again taken into the service of the United States, under orders from an assistant quartermaster of the United States Army, at New Orleans, Louisiana, and that said steamer remained in the service of the United States under such order from the 11th day of February, A. D. 1865, until the 16th day of July, 1865,
19 during which time her fuel was furnished and her crew paid by

the United States. The claimant received from the United States, for this service, the sum of eighteen thousand two hundred and forty-five dollars, which amount, under all the circumstances, the court consider a fair compensation for the use of said steamer, and refuse to make any further allowance for the service of said steamer.

III. That the claimant was the owner of the steamer "Time & Tide" and that said steamer was taken into the service of the United States in pursuance of a mandatory order issued by an assistant quartermaster in the United States Army at New Orleans, Louisiana, on the 21st day of March, 1864, and continued in the service of the United States in pursuance of such order, for the period of sixty days; and that the claimant was paid by the United States "on account," and not in full said service, the sum of three thousand dollars, being at the rate of
20 fifty dollars per day during the time said steamer was in the service of the United States as aforesaid; that the services of said steamer for said sixty days service were reasonably worth the sum of seven thousand and fifty dollars.

IV. That during the time each of said steamers were in the service of the United States as hereinbefore stated, they were in command of the claimant, or of some person employed by him, subject to his control and under his pay.

V. That in the case of each of these steamers, at the times when the same were respectively taken into the service of the United States, the officers acting for the United States, did not intend to "appropriate" these steamers to the United States, nor even their services, but they did intend to compel the captains and crews with such steamers to perform the services needed, and to pay a reasonable compensation for such services, and such was the understanding of the claimant, and that each of
21 said steamers, so soon as the services for which they were respectively required had been performed, were returned to the exclusive possession and control of the claimant; and that neither of them were seized by the military authorities for such service in consequence of the violation by either of them of any law of Congress, or of any regulation relating to commercial intercourse.

The court, from these facts, decided as a conclusion of law, that there was not such an "appropriation" of the claimant's property as prohibited the court from taking jurisdiction of the case, under the act of Congress entitled "An act to restrict the jurisdiction of the Court of Claims, and for other purposes," approved July 4th, 1864, but that there was such an employment and use of the claimant's property in the service of the United States as raises an implied promise on the part of the United States to reimburse the claimant for the money
22 expended by him for and on behalf of the United States, and also a fair and reasonable compensation for the services of the claimant and for the services of said steamers.

And the court therefore found that [that] there was due to the claimant from the United States—

For disbursements on account of, and for services rendered by, the steamer "J. H. Russell"	$28,705 33
For disbursements on account of, and for services rendered by, the steamer "Liberty"	8,600 00
For services rendered by the steamer "Time & Tide"	4,050 00

And thereupon the court rendered judgement in favor of the claimant against the United States for the sum of forty-one thousand three hundred and fifty-five dollars and thirty-three cents.

23 In the Court of Claims.

JOHN H. RUSSELL
vs.
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I, Sam'l H. Huntington, chief clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, and the final judgment of the court thereon; of the application of the Attorney General of the United States for the allowance of an appeal, as filed in the clerk's office, 15th of February, 1870, and of the order of the Court of Claims allowing the same; of the findings of facts and the conclusions of law on said facts on which the court founded its judgment.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Washington, this fifth day of May, A. D. 1870.

[SEAL.] SAM'L H. HUNTINGTON,
Clerk Court of Claims.

(Indorsement on cover:) No. 452. The United States, appellants, vs. John H. Russell. Court of Claims.
Filed 5th May, 1870.

In the Supreme Court of the United States.

DECEMBER TERM, 1869.

THE UNITED STATES, APPELLANTS,
vs.
JOHN H. RUSSELL. } No. 452.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

DECEMBER TERM, 1869.

THE UNITED STATES, APPELLANTS,
vs.
JOHN H. RUSSELL. } No. 452.

Brief for the United States.

STATEMENT OF FACTS.

This appellee, in his petition to the Court of Claims, alleged that, at several dates between July, 1863, and August, 1865, he was the owner of three steamboats, namely, the "J. H. Russell," the "Liberty," and the "Time and Tide," engaged in the navigation of the Mississippi River and its tributaries; and that these steamboats were seized and impressed into the service of the United States.

He alleged no contract on the part of the United States to pay for their services. On the other hand, by asking the court to render judgment for what these services, his disbursements, and damages *were reasonably worth*, he indirectly asserted that there was no contract.

The first and second counts of his petition refer to the steamer "J. H. Russell."

In the first he claims, as the reasonable value of her services, from August 8 to August 24, 1863, 17 days, $30,625; and as damages occasioned by her grounding while in the government service, $10,000.

To another steamer, which pulled this steamer off from where she grounded, was paid, it is alleged, out of this steamer's earnings, $2,500, of which sum a wrongful withholding is set forth as part of the wrongs suffered by the petitioner; but it is not clear whether or not any credit of this sum, or its complement, $200, is allowed the United States in his statement of the amounts due under this count. The earnings allowed by the quartermaster who settled and paid for this service of seventeen days were, in gross, $2,700. The claim is for more than $2,000 per day.

In the second count, for twenty-eight days' service of the same steamer, he claims $750 per day, without stating the amount, and as damage in the loss of private freight, $30,979, exclusive of the sum claimed as earnings. He acknowledges payment received, as near as he can state, of $2,395 67.

In the third count he alleges that the services for twenty-six days next following September 1, 1863, of the steamer "Liberty" were worth $500 per day, and that she was damaged to the amount of $4,000. He acknowledges receipt, in payment for services, of $1,800, and claims a balance of $13,900, though it does not appear how that balance is ascertained.

In the fourth count he alleges that the services (for seventy-seven days, May 1 to July 16, 1863) of the same steamer "Liberty" were worth $150 per day, acknowledges payment at the rate of $80 per day, and claims a balance amounting to $5,390.

In the fifth count he alleges that the services (for sixty days, between March 20 and May 28, 1864) of the steamer "Time and Tide" were reasonably worth, over and above running expenses, $150 per day; acknowledges payment at the rate of $50 per day, claiming a balance of $6,000. He alleges that the steamer was destroyed by fire on the last-named day, and that by the seizure of the vessel he was further damaged to the amount of $15,000, making, in all, $21,000.

In two of these counts he alleges that the taking into service was "against the remonstrances" of the petitioner.

The Court of Claims found that these steamers were taken into service, substantially as in the petition alleged, by military officers and military orders. There was no finding that these officers were authorized to make contracts, or that any contracts were made, or attempted to be made, in the premises.

The closing portion of their findings, with their conclusion of law, is as follows:

V. That, in the case of each of these steamers, at the times when the same were respectively taken into the service of the United States, the officers acting for the United States did not intend to "appropriate" these steamers to the United States, nor even their services, but they did intend to compel the captains and crews with such steamers to perform the services needed, and to pay a reasonable compensation for such services, and such was the understanding of the claimant; and that each of said steamers, so soon as the services for which they were respectively required had been performed, were returned to the exclusive possession and control of the claimant; and that neither of them were seized by the military authorities for such service in consequence of the violation by either of them of any law of Congress or of any regulation relating to commercial intercourse.

The court, from these facts, decided, as a conclusion of law, that there was not such an "appropriation" of the claimant's property as prohibited the court from taking jurisdiction of the case under the act of Congress entitled "An act to restrict the jurisdiction of the Court of Claims, and for other purposes," approved July 4th, 1864; but that there was such an employment and use of the claimant's property in the service of the United States as raises an implied promise on the part of the United States to reimburse the claimant for the money expended by him for and on behalf of the United States, and also a fair and reasonable compensation for the services of the claimant and for the services of said steamers. And the court therefore found that there was due to the claimant from the United States—

For disbursements on account of and for services rendered by the steamer "J. H. Russell"	$28,705 33
For disbursements on account of and for services rendered by the steamer "Liberty"	8,600 00
For services rendered by the steamer "Time & Tide"	4,050 00

And thereupon the court rendered judgment in favor of the claimant against the United States for the sum of forty-one thousand three hundred and fifty-five dollars and fifty-three cents.

The facts thus presented make appropriate the following points of—

ARGUMENT.

I. The petition alleges, and the case finds, that there was, in reference to these steamers or their services, no contract, express or implied, such as is necessary in order to authorize judgment for the petitioner in the Court of Claims.—(See act of Feb. 24, 1855, sec. 1, X Stat. L., 612.)

Neither intention nor non-intention of the officers, nor yet "understanding of the claimant," can create such a contract. It can only be made in accordance with law; in other words, by virtue of authority conferred by the law-making power of the United States.

II. Not only is this case not brought within the jurisdiction of the Court of Claims by the statutes which define that jurisdiction, but, further, it is excluded from that jurisdiction by express provision of statute.

The first section of the act of July 4, 1864, provides—

> That the jurisdiction of the Court of Claims shall not extend to or include any claim against the United States growing out of the destruction or appropriation of or damage to property by the army or navy, or any part of the army or navy, engaged in the suppression of the rebellion from the commencement to the close thereof.—(XIII Stat. L., 381.)

That this claim is within the prohibitions of that statute, see Filor *v.* U. S., 9 Wall., 48–49.

AMOS T. AKERMAN,
Attorney General.

Supreme Court of the United States.

DECEMBER TERM, A. D. 1870.

THE UNITED STATES, Appellant,

vs.

JOHN H. RUSSELL, Appellee.

No. 220.

APPEAL FROM THE COURT OF CLAIMS,

——:-o-:——

ARGUMENT FOR APPELLEE.

——:-o-:——

COOLEY & CLARKE,
JOHN J. WEED,
Counsel for Claimant.

WASHINGTON:
POWELL, GINCK & CO., PRINTERS.
1871.

Supreme Court of the United States.

DECEMBER TERM, A. D. 1870.

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THE UNITED STATES,
APPELLANT,
vs.
JOHN H. RUSSELL,
APPELLEE.

Appeal from the Court of Claims.

No. 220.

———:-0-:———

ARGUMENT FOR THE APPELLEE.

I.

The appellee instituted his suit in the United States Court of Claims, and upon the trial thereof in that court, he recovered judgment for the sum of forty thousand three hundred and fifty-five dollars and thirty-three cents. From that judgment the United States appeal to this court. There is no controversy about the facts, and as they are found by the court they may be grouped and stated as follows:

1st. That the claimant was a loyal citizen of the United States, resident in Michigan during the late rebellion; and that at different times during said rebellion, he was the owner of three different steamboats, named in the findings of fact certified here by the Court of Claims.

2d. That while said steamers were in the possession and under the control of the claimant, and employed by him in lawful trade upon the Mississippi river, they were each, at different times, *impressed* or *temporarily taken* by the United States military authorities for military purposes.

3d. That the claimant was *partially* paid by the United States for the services of said several steamers rendered while in the military service of the United States, under such impressment or taking.

In the facts found by the Court of Claims, it is stated in respect to the character of the impressment or taking of each of these steamers, as follows:

That in the case of each of these steamers, at the times when the same were respectively taken into the service of the United States, the officers acting for the United States did not intend to "appropriate" these steamers to the United States, nor even their services, but they did intend to compel the captains and crews with such steamers to perform the services needed, and to pay a reasonable compensation for such services, and such was the understanding of the claimant; that each of said steamers, so soon as the services for which they were respectively required had been performed, were returned to the exclusive possession and control of the claimant; and that neither of them were seized by the military authorities for such service in consequence of the violation by either of them of any law of Congress, or of any regulation relating to commercial intercourse. Record, p. 9.

II,

It is urged by the United States, that the Court of Claims had no jurisdiction of the cause of action asserted in the petition of the appellee, nor upon the facts found by the court, had it any power to render judgment in said cause. It is alleged by the United States, that jurisdiction in this cause was denied to the Court of Claims by the provisions of the act of Congress approved July 4, 1864. So much of that act as affects this question, is as follows:

That the jurisdiction of the Court of Claims shall not extend to or include any claim against the United States growing out of the destruction, appropriation of, or damage to, property by the army or navy, or any part of the army or navy, engaged in the suppression of the rebellion, from the commencement to the close thereof. 13 Stat. at Large, 381.

It is also objected on the part of the United States, that there was, in respect to the claimant's steamers and their services, no contract, either "*express or implied*," with the United States, such as is necessary in order to authorize judgment for the appellee in the Court of Claims, and under the act of Congress providing for the organization of that court. We shall discuss these questions in the order we have stated them, because we regard the *first* objection as the only one about which there need be any discussion. If the Court of Claims was not deprived of jurisdiction of the cause of action asserted and proved by the appellee in the Court of Claims, by the act of Congress above quoted, then the authority of the Court of Claims to render judgment, under the act for its organization, is unquestioned; for by that act it had jurisdiction "to hear and determine *all claims founded upon any contract, express or implied*, with the Government of the United States."

Against the positions assumed by the Attorney General, we shall endeavor to establish on behalf of the appellee, the following propositions:

1st. That the taking and use by the United States military authorites of the claimant's steamboats, as found by the Court of Claims, was not such an "APPROPRIATION" of the claimant's property to the use of the United States, as excludes the claim asserted in the claimant's petition from the jurisdiction of the Court of Claims, under the provisions of the act of Congress, approved July 4th, 1864, as above quoted.

2nd. That the facts found by the Court of Claims, are sufficient to create an implied contract on the part of the United States, by which it is bound to make compensation to the claimant, for the use of his steamboats for the time they were respectively used and employed in the military service of the United States, and that the claim resulting

from such service asserted by the appellee, was and is, therefore, within the jurisdiction of the Court of Claims, as defined by the first section of the act providing for the organization of that court.

A. The case under consideration presents no question of "*destruction*" or "*damage*" to property. The only question involved here, is whether there was such an APPROPRIATION of the claimant's property by the United States, as deprives the Court of Claims of jurisdiction to hear and determine the claim resulting from such "*appropriation.*"

The word "*appropriation,*" in its ordinary signification, as defined by Webster, means: "*The act of setting apart or assigning to a particular use or person, in exclusion of all others; application to a special use or purpose, as of a piece of ground for a park, &c.*" In this act it evidently means a *taking* of private property for public use, in the constitutional sense of that term. Its use in the act under consideration, was to designate a certain mode of taking private property for public use, from which an implied contract to make compensation would result. If the *takiny* or *appropriation* of the property was in the exercise of the right of *eminent domain*, then it will be conceded that the jurisdiction of the Court of Claims to adjudicate upon the claim resulting from such *taking* or "*appropriation,*" was by the terms of the act we are considering at an end. The Court of Claims find, that there was not such an "*appropriation*" of the property of the appellee as that act required, to divest that court of jurisdiction to hear and determine the cause.

The facts found by the Court of Claims are inconsistent with the exercise of the right of *eminent domain.* The legal incidents of an appropriation of private property for public use in the exercise of that right, are all inconsistent with the facts found by the Court of Claims and certified

here. We invite your attention to some of the legal incidents of the exercise of that right.

1st. There must be a *necessity* for the exercise of that right, and the necessity must be of such urgency that a resort to the usual means of securing the article would be unavailing.

Mitchel vs. *Harmony*, 13 Howard, 115.

2d. The exercise of this right contemplates the exclusive possession and use of the property taken by the sovereign. It contemplates too a severance of the title from the owner, and a vesting of the title in the sovereign. The sovereign becomes the absolute owner of the property taken or appropriated the very instant this power is exercised. The exercise of this right is in its nature absolute, and it contemplates neither a restoration of the property to its former owner, *nor compensation for the use of such property after the exercise of this right*.

3rd. That the exercise of this right is never to be presumed or justified, in the absence of proof that there was a necessity for its exercise, and no other way of acquiring the property taken or appropriated for the public use. In the case of *Bogart* vs. *The United States*, (2 Court of Claims R. 159,) the court, speaking of the exercise of this right, use the following language:

* * * The taking of private property under the right of *eminent domain, is the last means for acquiring property to be exercised by a sovereign or to be resorted to by a court.*

The policy of the Government also has always been against its free exercise, and to acquire by purchase where that was possible, rather than by resorting to this power.

Again, in this same case, the court use this language:

When the court can impute to the Government a fair compliance with the terms of its agreements, or an *unnecessary exercise of its power*, it is not a question, which construction of its acts shall be adopted.

The case out of which this language and decision came, was that of a charter of a vessel by an authorized agent of the Government, in which it was provided that the United States might purchase the vessel at a stipulated price. While in this service, under her charter, and before any intimation had been given to the owner of a purpose on the part of the Government to purchase or take her under the provisions of the charter, she was destroyed by the military authorities from considerations of public necessity, or for the public service. It was objected when that claimant brought suit to recover the balance due him for the value of his steamer so destroyed, that the court had not jurisdiction, because of the act of July 4, 1864. The court, however, overruled the objection, and rendered judgment for the claimant.

4th. The exercise of this right will not be presumed, unless the *intention* is clearly expressed. To ascertain what the *intention* of the officer who assumed to exercise this right on behalf of the United States was, we refer to the facts attending its exercise. In legislative enactments where this right is exercised, or conferred upon others to exercise, it has been held that: "It must appear that the Government intend to exercise this sovereign right *by clear and express terms, or by necessary implication, leaving no doubt or uncertainty respecting such intent.*

Boston and Lowell R. R. Corporation vs. *Salem and Lowell R. R. Co. et als.*, 2 Gray, 36.

State vs. *Noyes*, 47 Maine R., 207.

There was in respect to the property of the appellee taken and used by the military authorities of the United States, none of the incidents of the exercise of this right. The property was not taken from the possession of its owner. The title of it remained in him, and he was allowed to resume undisputed control over it, the very

instant the necessity for its use had passed away. There was partial compensation for the use of the property by the United States, during the time it was in the service of the United States, as found by the Court of Claims. The officers of the United States did not *intend* to *appropriate* the property of the appellee, but only to require the claimant to perform certain service for the United States, with his steamboats and their crews, with the express understanding at the time that he was to be paid a reasonable compensation therefor. We close the consideration of the question of the *intention* and meaning of this statute, by quoting so much of the opinion of the Court of Claims as delivered in this case, as is devoted to this subject. It is as follows :

The only defense set up by the Attorney General in this case, on behalf of the United States, is the act of July 4, 1864. It is insisted that it was an appropriation by the army of the property, within the meaning of the first section of the act, and therefore excluded from our jurisdiction. But we do not think the case falls within the letter or spirit of the act. That law was intended to embrace all those cases of direct and incidental destruction of, and damage to, property, which are inseparable from the operations of large land and naval forces carrying on active hostilities against an enemy, as well as the unlicensed predatory acts and pillage of the soldiery. The act further excludes from our jurisdiction all authorized cases of seizure and appropriation of property, by the army and navy engaged in the suppression of the rebellion. And where competent military or naval authority has so seized and appropriated property, we have clearly no jurisdiction. The right of the Government, in times of peril or great public exigencies, to take and apply the property of any citizen to secure the safety or well-being of the Government, is not disputed, but admitted to the full extent. But under a just and free Government like ours, such a procedure is only resorted to and can only be justified when the public necessities are pressing and the peril is imminent. And even in all such cases, the obligation of the Government to make, and the citizen

to receive, just compensation for the property so taken is complete and perfect. Here the services of the claimant's vessels, his own, and those of the crews sailing them, were not seized with a view of appropriating the property to the United States within the meaning of this act.

Such an appropriation is not to be inferred when the facts are capable of a different application and solution, because a just and paternal government never resorts to this extraordinary mode of supplying its wants, except in great exigencies and when all the usual methods have failed, or would be inefficient or unavailing. And because this is so, an arbitrary seizure and appropriation of the property of the citizens by the Government, will not be presumed, when its acts may reasonably be accounted for by a different conclusion. *In the case in hand, there does not appear to have been any intention to appropriate these boats to the United States, or even their services; but to compel the captains and crews to perform certain duties, and to pay them a reasonable compensation for such services.*

This is evidenced by the fact that the Government has, from time to time, paid to the claimant certain sums on account of those services, both while the boats were rendering it and since. It is shown further, that when such services were no longer required, the boats were discharged and delivered up to the owner; a proceeding entirely inconsistent with an appropriation of them to the United States. (*Bogart v. The United States*, 2 *C. Cls.*, 159; *Mitchell v. Harmony*, 13 *How.*, 115.)

We think there was no appropriation of this property or services, but such an employment of them in the service of the United States, as raises an implied promise to reimburse the claimant for the money expended for the United States, and a fair and reasonable compensation for his own services and those of his vessels.

B. Congress has given to this act of July 4th, 1864, something *more than a legislative construction.* In subsequent legislation it has very clearly declared the scope and purpose of this act, by direct reference to it, and in terms *repealing* to some extent the restricting provisions of that act. By an act of Congress which became operative February 19, 1867, it was provided as follows:

That the provisions of chapter two hundred and forty of the acts of the thirty-eighth Congress, first session, approved July fourth, eighteen hundred and sixty-four, shall not be construed to authorize the settlement of any claim for supplies or stores taken or furnished for the use of, or used by, the armies of the United States, nor for the occupation of, or injury to, real estate; nor for the consumption, appropriation, or destruction of, or damage to, personal property, by the military authorities or troops of the United States, *where such claim originated during the war for the suppression of the Southern rebellion, in a State, or part of a State, declared in insurrection by the proclamation of the President of the United States, dated July first, eighteen hundred and sixty-two, or in a State which by an ordinance of secession, attempted to withdraw from the United States Government.* 14 *Stat. at Large*, 393.

By the act of July 4th, 1864, jurisdiction was denied to the Court of Claims to hear and determine any cause "growing out of the destruction of, damage to, or appropriation of, any property by the army or navy, or any part of the army or navy, engaged in the suppression of the late rebellion." But by the act above quoted, the prohibition of payment is confined only to such claims as originated during the war for the suppression of the rebellion in a State, or part of a State, declared in insurrection. Is not the conclusion inevitable, that by thus specifying the claims excluded from settlement, it impliedly conceded the right to the settlement and payment of those claims not so excluded? Is not the maxim, *expressio unius est exclusio alternus*, applicable here? The Court of Claims found that two of the claimant's steamboats were taken into the service of the United States at St. Louis, Missouri, and that the reasonable value of the services of said boats for the time they were in such service remaining unpaid, was thirty-seven thousand three hundred and five dollars and thirty-three cents. It is clear that this part of the claim stated in the petition of the appellee, did not originate in a State, or part of a State,

declared in insurrection, for the claim must be held to "*originate*" at the place where the said steamboats were taken into the service of the United States. Is it not clear that it was the *intention* of this act to restore the jurisdiction of the Court of Claims to such claims as would result from an *appropriation* of property, if such appropriation was made in a State *not* declared in insurrection?

There is, however, a more express declaration by Congress upon this question. We find it in a joint resolution of Congress, approved December 23d, 1869. It is as follows:

That the act of February nineteenth, eighteen hundred and sixty-seven, entitled "an act to declare the sense of an act entitled 'an act to restrict the jurisdiction of the Court of Claims,'" and so forth, and so forth, shall not apply to, nor be construed to debar, the settlement of claims for steamboats or other vessels taken without consent of the owner, or impressed into the military service of the United States, during the late war in States, or parts of States declared in insurrection; *Provided*, the claimants were loyal at the time their claims originated, and remained loyal thereafter, and were residents of loyal States, and such steamboats or other vessels, were in the insurrectionary districts, by proper authority, viz: charter, contract, impressment, or in conformity with rules or regulations established by the Secretary of the Treasury, and approved by the President of the United States.

It may be urged in reply to these statutes, that they have relation only to claims which may be adjusted by the Quartermaster and Commissary Generals, under the *second* and *third* sections of the act of July 4th, 1864. But this construction cannot be maintained, because the right to make settlements by those officers, under that act, was limited to settlements for "*quartermasters' stores*" and "*subsistence*" furnished to the army, where the same was furnished with or without a receipt by the officer receiving it for the United States. Clearly steamboats are not

"quartermasters' stores" within the meaning of that act. The language of the joint resolution we are now considering says, that the act of February 19th, 1867, "shall not be construed to debar the settlement of claims for steamboats or other vessels taken without consent of the owner, or impressed into the military service of the United States, although such steamboats or other vessels were taken or impressed in a State, or part of a State, declared in insurrection. "Shall not be construed to debar the *settlement*," is the controlling language of this act. This is a word of comprehensive, and not of *technical* import. It must mean *any* adjudication of a claim by which the liability of the United States shall be ascertained and determined. The Court of Claims, by the very terms of the act providing for its creation, was declared to be "a court for the investigation of claims against the United States." By the terms of the act defining its jurisdiction, it could "hear and determine all claims founded upon any express or *implied contracts*" with the United States. The act of July 4th, 1864, divested that court of jurisdiction to "hear and determine" certain cases of *implied* contracts. Those were implied contracts resulting from the destruction, or appropriation of, or damage to, property by the army or navy engaged in the suppression of the late rebellion. It must have been intended by this act to deprive the Court of Claims of jurisdiction of those cases where the property of the citizen was destroyed, appropriated, or damaged in the exercise of the right of "*eminent domain*." Thus the jurisdiction of the court in respect to this class of cases remained until the act of February 19th, 1867, became operative. That act said, by the strongest implication, that the restricting provisions of the act of July, 1864, should only extend to cases or claims which might arise in a State, or part of a State, declared to be in insurrection, or had passed an ordinance of

secession. The legal effect of this act was to *restore* to the Court of Claims its jurisdiction to hear and determine *every case of implied contract, where the cause of action arose in a State which had never been declared in insurrection.* The joint resolution of December 23d, 1870, went still further in that direction, for it provided that the settlement of claims for steamboats or other vessels taken or impressed into the military service of the United States, "*should not be debarred,*" although such claims accrued in a State, or part of a State, declared in insurrection. Both the acts of February 19th, 1867, and that of December 23d, 1870, are *remedial* in their character. They should, therefore, be liberally construed—so as to *advance* rather than *restrict* the remedy.

Smith's Stat. and Con. Construction, page 692, sec. 547.

We invite your attention to another view of this act of July 4th, 1864. We submit that it did not intend to deprive the loyal citizen of a remedy for the assertion of his rights when his property had been temporarily *used* by the Government; but that it was enacted to provide against the assertion of claims which might be presented in consequence of appropriations of property in the immediate vicinity of actual military operations; to prevent the payment of the claims of disloyal persons where the question of their loyalty could not be examined or investigated; and to suspend, for the time being, all claims which were the inevitable result of a prosecution of the war. It could not have been nor was it the purpose of this act to deprive loyal citizens, whose claims resulted from the use of property far removed from the scene of war, of a remedy for the enforcement of their right to have compensation for the use of such property.

C. It is insisted by the Attorney General, that the case of *Filor et al* vs. *The United States,* 9 Wallace, 48,

has settled the legal principles upon which this case depends, and is decisive of it. An examination of that decision, in connection with the facts found in the case we are considering, will hardly warrant that assumption. In that case the suit was brought upon a lease, entered into between a lieutenant and assistant quartermaster of the United States army, and the owner of certain real estate and storehouses, situated at Key West, Flórida. The lease was of property captured from the enemy, and the officer attempted to bind the United States to an annual rent therefor, at the rate of six thousand dollars per annum. The case turned upon the authority of the officer to bind the United States by the lease upon which the suit was instituted. The Court of Claims held that the suit upon the lease, to recover the stipulated rent, could not be maintained, because the person attempting to lease the property had not a valid or sufficient title to the property, and could not therefore recover compensation from the United States for property that he did not own. But in this court you decided, that even if the person who assumed to be the owner of the property, had been possessed of a valid title thereto, still no action could be maintained upon it, because the officer who attempted to bind the United States by the lease, had no lawful authortiy for that purpose, and that the lease was therefore void as an obligation against the United States. There was no question of an implied contract, resulting from an *appropriation* of private property for public use, involved in the case. The suit was brought upon a special contract under seal, which the court held void, and there ought to have been an end of the case. We have no purpose to call in question the correctness of the decision of the court in that case. We would concede its correctness for other, and perhaps equally sufficient reasons assigned by the court for its conclusions. But we do insist that mere *dictum* of the court, not essential to a de-

cision of the legal questions involved in that case, shall not be regarded authority for some other case where other and different questions are involved.

It cannot be questioned that the officers under whose authority the steamboats belonging to appellee, were taken into the service of the United States, had authority to make contracts, or enter into charter-parties for the use of these steamboats, and bind the United States by them to pay for such use, the price stipulated in such contract or charter-party. The court find that each of the steamboats belonging to the appellee were taken into the service of the United States, by an officer of the Quartermaster's Department. The duties of that department, as defined in the Revised Army Regulations, are as follows:

"Article XLII. Quartermaster's Department, 1064."

"This department provides the quarters and *transportation* of the army, storage and *transportation* for all army supplies, &c."

These steamboats were taken into the military service, in order to provide "*transportation* for troops in the military service, and army supplies for such troops." Any officer of this department, therefore, may make contracts to furnish any article needed for the military service which that department is by law required to provide. The only limitations upon the power to make contracts by an officer of that department, are the general limitations of the statute on the subject of contracts. Those limitations are, 1st: That the contract shall be authorized by law; or, 2d. That there shall be an appropriation adequate to its fulfillment.

12 Stat. at Large, p. 220, Sec. 10.

But these limitations do not apply to contracts for *transportation* made by the quartermaster's department. Such contracts are specially excepted out of the restricting provisions of the above statute.

There was no legal impediment in the way of the officer taking these steamboats that would deprive him of authority to make a contract for the use of them. He could contract for them, or he could *impress* them into the military service against the will and protest of the owner. If he made a contract, it must be done as the law required. If there was no exigency in the public service requiring the immediate delivery of the article needed, or the service required, then the officer must advertise for proposals for furnishing the needed article, or the required service. If an exigency exists, then the officer is authorized to obtain the article or arrange for the performance of the service, "in the same manner in which such articles are usually bought and sold, or such services engaged, between individuals.

12 Stat. at Large, 220. Sec. 10.

If the officer might, in a certain case, make an agreement or arrangement for the use by the United States, of property used in the military service, in a time of public emergency, in the same manner as an individual would do, it would seem clear that he might make a verbal agreement or arrangement, by which the United States would be bound to make compensation for the use of the property taken and used by the United States under such arrangement or agreement.

The officer exercising the authority to enter into a verbal arrangement or agreement, to pay for property used by the United States in a public emergency or exigency, is alone the judge of the existence of that emergency.

United States vs. *Reside*, 2 Court of Claims R., 27.

Same vs. *Stevens*, Ibid., 101.

Same vs. *Floyd*, Ibid., 439.

The decision of the Court of Claims in the last of the above named cases, was affirmed by this court upon appeal.

United States vs. *Speed and Davis*, 8 Wallace, 77.

In the decision in that case, the court used the following language :

It is too well settled to admit of dispute at this day, that where there is a discretion of this kind conferred on an officer or board of officers, and a contract is made in which they have exercised that discretion, the validity of the contract cannot be made to depend on the degree of wisdom or skill which may have accompanied its exercise.

We submit, therefore, that if the officers under whose authority these steamboats were taken into the military service of the United States, might lawfully make contracts for their use by the United States, and might lawfully impress them into its service, such officers might therefore make such arrangements with the owner of any property so taken, as would bind the United States, as upon an implied contract, to make compensation for the use of such property. And the question involved here is, whether in respect to the property of the appellee, taken into the military service of the United States, as found by the Court of Claims, there was such an understanding between the officers taking the property and the appellee, as would amount to a contract to pay for the use of said property, what it was reasonably worth. Did the appellee and the officers understand that the property of the appellee was "*appropriated*" to the use of the United States, in the exercise of the right of *eminent domain*, or did they understand and act upon the agreement or arrangement, that compensation was to be made for the use of such property while in the service of the United States. The Court of Claims answer this question in a manner which relieves us from any doubt upon this question, for the court find expressly that it was the understanding between the appellee and the officers who took the property, that payment of the reasonable value of the use of the property was to be made by the United States in consideration of its use,

and that acting upon *that* understanding, partial pay ments were made to the appellee for the use of his steamboats.

We submit, therefore, upon the question of the jurisdiction of the Court of Claims, the following conclusions :

1. That upon the facts found by the Court of Claims, there was not such an *appropriation* of the property of the appellee, as excluded this case from the jurisdiction of that court, under the restricting provisions of the act of July 4th, 1864.

2. That from the facts found by the Court of Claims, this court must conclude that the steamboats belonging to the appellee, were taken into the service of the United States under a valid agreement on the part of the United States, to pay for their use what they were reasonably worth, rather than that the officers took them in the exercise of the right to take property for public use.

3. That the existence of such emergency as justifies the taking or appropriation of private property for public use, *is never to be presumed*, and in the absence of proof of the existence of such justifying emergency, the court will presume that the officers acting for the United States acquired the right to use the property of the appellee in a lawful manner and for a legal purpose. The court will not presume that the officers representing the United States acted unlawfully.

4. That even if there was no formal written contract between the appellee and the officers acting for the United States in regard to the use of the steamboats belonging to the appellee, yet if the appellee assented to the use of said steamboats, with the understanding at the time said boats were taken into the service of the United States, that he was to receive pay therefor what the use of said steamboats was reasonably worth, and said steamboats

were used by the United States in pursuance of such assent and understanding, then the appellee was, and is, entitled to recover therefor such sum as the services of said steamers were reasonably worth; and of a claim growing out of such use of said steamboats, the Court of Claims has jurisdiction.

5. That the acts of Congress of February 19th, 1867, and December 23d, 1869, must be construed as repealing the act of July 4th, 1864, so far as to give to the Court of Claims jurisdiction of the cases specified in said acts, and the claim asserted in the petition of the appellee being expressly provided for in the declaratory act of December 23d, 1869, the Court of Claims had jurisdiction thereof, and could lawfully render judgment in favor of the appellee.

III.

The Attorney General excepts to the judgment of the Court of Claims, because there was no express or *implied* contract proven, such as would authorize said court to render judgment against the United States; and in connection with this exception, he asserts the following proposition, viz:

Neither intention nor non-intention of the officers, nor yet understanding of the claimant, can create such a contract. It can only be made in accordance with law, in other words, by virtue of authority conferred by the law-making power of the United States.

This proposition seems to raise the question as to whether the United States can ever become liable upon an *implied contract*. It seems to us, that it might with equal propriety be asserted that the United States could not become liable upon an *express contract*. In either case, the question is one of lawful authority. The United

States cannot be held liable upon an *express contract*, unless the agent acting in its behalf has authority to bind it, and we admit that the authority of the agent must be derived from law. The general rule announced in Story on Agency, may with propriety be cited here:

In respect to the acts and declarations and representations of *public agents*, it would seem that the same rule does not prevail which ordinarily governs in relation to mere private agents. As to the latter (as we have seen) the principals are in many cases bound where they have not authorized the declarations and representations to be made. But in cases of public agents, the Government or other public authority is not bound, *unless it manifestly appears* that the agent is acting within the scope of his authority, or he is held out as having authority to do the act, *or is employed in his capacity as a public agent to make the declaration or representation for the Government.* Indeed, this rule seems indispensable in order to guard the public against losses and injuries arising from the *fraud, or mistake, or rashness, or indiscretion of their agents.* And there is no hardship in requiring from private persons dealing with public officers, the duty of inquiry as to their real or apparent power and authority to bind the Government. Story on Agency, p. 381, Sec. 307, A.

We have only to determine, therefore, in connection with this inquiry, whether the agent who acted for the United States, in taking into its military service the steamboats belonging to the appellee, might lawfully have made a *special contract*, by which the United States would have been bound to pay a stipulated compensation for the use of said steamboats. *Because if the agent had authority to bind the United States by express contract, he might also render it liable upon an implied contract.* We have shown in another part of this argument, that the officers who took the steamboats of the appellee into the military service of the United States, had lawful authority to take them, and that the facts found by the Court of Claims very clearly proved, that the said steamboats were taken for a lawful

purpose and used in the public service, to the benefit and advantage of the United States. The facts from which it is claimed an *implied* contract results in this case, are as follows: 1st. That certain steamboats belonging to the appellee were taken into the military service of the United States, in pursuance of military orders. 2d. That the officers under whose orders said steamboats were taken into the military service, had authority to obtain said steamers for the use of the United States by charter or otherwise. 3d. That the officers taking said steamboats on behalf of the United States, inteuded to pay the appellee for their services what they were reasonably worth, and the appellee understood that they were taken by the officers with that intention. 4th. That said steamboats were used by the United States with that understanding, and partial payments for such use made by the officers taking said steamboats.

It is in this view that the question of the *intention* of the officers taking the steamboats of the appellee, becomes material. It is material, because the *intention* determines whether there was an undertaking to pay for the use of the steamboats, or an *appropriation* of them without that undertaking. As between individuals, what would be the legal results of the existence of the above facts? Would there be any question as to the liability of an individual for the use of property taken and used under the circumstances above stated? There can be no better statement of the legal effect of the above facts, than is found in the language of Chief Justice Marshall, in the case of *Gibbons* vs. *Ogden*, 12 Wheaton, 341, where he says:

A great mass of human transactions depend upon *implied contracts* which are not written, *but grow out of the acts of the parties.* In such cases the parties are supposed

to have made those stipulations, which as honest, fair and just men they ought to have made.

There can be no more comprehensive definition of an *implied contract*. It is not a rule by which the acts of individuals alone are to be measured. It applies to governments as well as individuals, and determines the liabilities of each, with the same regard to justice and reason.

Conrad vs. *The United States*, 3 Court of Claims R., 89.

Brooke vs. *Same*, 2 ibid., 80.

If the facts found by the Court of Claims and certified in this case, do not create an implied obligation on the part of the United States to pay the appellee for the use of his property, taken and used by the United States, then it would seem *impossible* to ever render the United States liable upon an implied contract.

There is no question in issue in regard to the authority of the officers who acted for the United States in taking these steamboats into its service. That the use of said steamboats were necessary to the public service is not denied. That their use was reasonably worth the amount found by the Court of Claims is not questioned. That the officers taking these steamboats into the military service intended to compensate the appellee for their use is admitted. Surely these facts justified the Court of Claims in deciding in favor of the appellee, and in its statement of the following legal conclusion: "That there was such an employment and use of claimant's property in the service of the United States, as raises an implied promise on the part of the United States to re-imburse the claimant for the money expended by him for and on behalf of the United States, and also a fair and reasonable compensation for the services of the claimant and for the services of said steamers."

We submit this case, in the confident belief that the decision of the Court of Claims was justified both by the law and the evidence, and that upon its examination here, there will be found no legal objection to an affirmance of the judgment of that court. The public faith and common honesty alike require this.

COOLEY & CLARKE,
JOHN J. WEED,
Attorneys for the Appellee.

Supreme

UNITED STATES COURT

DECEMBER TERM, 1868.

JOHN H. RUSSELL,

ads;

THE UNITED STATES.

No. ~~2928.~~ 220

Claimant was the owner, in 1863 and 1864, of three steamboats, constructed for carrying freight and passengers on the Mississippi river and tributaries. They were put to such use by him for his individual benefit and profit. They were operated under authority of licenses issued by the proper authorities of the United States. While so engaged lawfully, in the pursuit of his lawful calling, the military authorities of the United States at St. Louis and at New Orleans, having immediate necessity to use said boats for the transportation of quartermaster's supplies, for the use of the army then in the field, *required* claimant to abandon his agreements previously made, and then in the process being made, for freight and passengers, at highly remunerative figures, whereby he would have had full and profitable cargoes, in order that the Government might have the *exclusive* use of his boats for the purpose before named. To that end, military orders were issued to detain the boats and forbidding the taking of freight or passengers on private account, and putting the boats, for the time being, under the exclusive control of the Government officials. There were three boats thus impressed, all the property of claimant, viz, the "J. H. Russell," "Liberty,"

and "Time and Tide." The time they were so engaged in the public service is set forth with circumstantial accuracy in the very able brief of Cooley, Clark & Weed, filed in this case, with correct references to the testimony, which clearly establishes the claims.

The boats sustained more or less injury while so being used by the neglect, hard usage, and misconduct of the employees of the Government, whereby great damage ensued to claimant, as abundantly appears by the evidence, to which also reference is appropriately made in the brief before referred to. The injury was the natural and logical result of the improper way in which the boats were used, and occurred while in the Government employ, so that there can be no reasonable doubt as to the liability of the Government to respond for such damages. The claims, therefore, are twofold, one for the use of the boats and the other for the damages which the boats suffered while being so used, and while in the actual use and within the control of the defendant.

To which must be added the outlays of claimant, made by him to pay the expenses of said boats while in the actual, use and employment of the United States.

The facts are not, and will not be, disputed.

The loyalty of the claimant is conspicuously proved.

His ownership is recognized and proved.

The value of the services is as clearly established.

So likewise as to the damages done to the boats, and the circumstances which led to them.

And the actual outlays of claimant to pay the expenses of running said boats.

I do not stop to consider the evidence *seriatim*, which goes to make up and establish these claims. Happily I am saved that trouble by the very satisfactory analysis of it made in the brief before referred to. I shall content myself with a general reference to it, as may seem to be necessary to illustrate the propositions under discussion.

There are a few propositions very plainly manifested in the evidence.

1. That the boats were used in the service of the Govern-

ment, as is claimed. It is not a matter of any consequence how they came to be so used, so long as it appears that the Government derived benefit from that use, and the claimant has not been paid for it. This is an action for work and labor, care and diligence, and for money laid out and expended, and also for damages done the property of claimant in the use of it. Claimant *owned* the property, which did not *owe* service to the Government by virtue of any law, contract, or usage; therefore any use of it by the Government must be paid for, on the principles of equal and exact justice, which apply as well to the Government as to its citizens. The fact that the military authorities *required* the service, is of no further consequence than to show that there was a *necessity* for employing the boats at the times and under the circumstances proved. They wanted the boats as carriers of war munitions and supplies, and impliedly, *at least*, agreed to pay for their service what it was reasonably worth. The orders applied to the use of the boats as carriers, because, when loaded, the owner was left to control his boats in his own way, no military guard or other authority being put in charge of them; all he was required to do, being to deliver the cargoes as directed. Thus, the boats became carriers for the Government. Military or unmilitary, does not matter. It is like the case of an individual who commits a tort, for which he is liable in an action *ex delicto*, and also *ex contractu*. The party aggrieved may waive the tort, and sue for damages sounding in contract. Here claimant asks his damages to be paid to him in the nature of an action for a breach of contract.

2. There was no seizure or other forcible appropriation of the boats. Claimant acquiesced in the order to carry the goods. This view takes the case out of the act of the 4th July, 1864, and carries it beyond and outside of the influence of the remedial act of 9th February, 1867. The last-named act was intended to make more specific, but not to enlarge that of the 4th July. That act took away the jurisdiction of this court in such claims as grew out of the destruction, appropriation, or damage to property by the army and navy, &c. Obviously the claims do not come within the meaning of

this act, as there was no destruction, appropriation, or damage done to this property by the army or navy. It is to be observed that Congress does not confine the operation of this act to the rebel States, but extends it to every State where the army and navy operated during the rebellion. This enables us to determine what was meant to be excluded by this act. Supplies, transportation, &c., furnished or procured from loyal owners were not aimed at, but such property as was destroyed or appropriated or damaged by the army and navy in the field *as an act of war*. This construction will the more readily be adopted when we consider that at that very time, in almost every State in the Union, including a part of Louisiana, then in our possession and control, the Government was securing supplies of every description for the use of the army and navy, by advertisements and purchases in open market, and without which the army could not have moved a mile or existed an hour. Such contracts as afforded such supplies were not therefore intended to be affected by this law. Now, the act of the 9th ~~July~~ February, 1867, differs from this chiefly in limiting its operation to the settlement of claims that did not originate in the States in rebellion and during the war, such claims as grew out of supplies that "were taken or furnished" to our troops. There is not the slightest reference to supplies, &c., furnished under *contracts* made with loyal persons within the terms of existing laws. Congress must have had those laws, and the daily action of our military authorities under them, in view, and did not therefore embrace them within the operation of this law. So that, if a contract of affreightment were made in Missouri, to be executed or consummated in Louisiana, Congress did not mean to be understood as saying that such a contract should fall within the operation of this law; nor if the contract had been made and was consummated within our military lines with a loyal citizen, who was subject to the jurisdiction and control of our authorities. Such contracts would be free from the disability created by this law. A contract made by a quartermaster or a commissary, thereto duly empowered by law, was not aimed at by either of these laws. If this view is not correct, we would be con-

strained to ascribe to Congress a purpose to *repudiate* contracts lawfully made, by the *only* authorities known to the laws of the United States empowered to make them.

This case is a striking illustration of the dangerous consequences that must follow a different construction. This claimant owned and was operating three steamboats, *under authority of our laws*, whose services were needed by the quartermaster's department to carry army stores to New Orleans and elsewhere within our own military lines. They are freighted with such stores, and the owner ordered to take them to their destinations. He is charged with the duty, and held to the responsibility, of seeing them delivered at their destination. The authority to make the contracts is unquestioned. Can there be any more doubt of the power and jurisdiction of this court to enforce them? The stores were duly delivered, there being no complaint on that head. The claimant advanced the money necessary to pay the expenses of running the boats during the time he was carrying out these contracts, and which was necessary to enable him to carry them out. His boats were overloaded by the orders of the quartermaster, and against claimant's protest, and thereby and from other causes, resulting from the abuse of these authorities, seriously injured, and now he applies to this court for damages, resulting from the breaches of these contracts; contracts lawfully made, lawfully carried out on his part, and heedlessly broken on the part of the Government.

I am unable to perceive any serious obstacle to the relief asked.

R. M. CORWINE,
of Counsel.

Strong

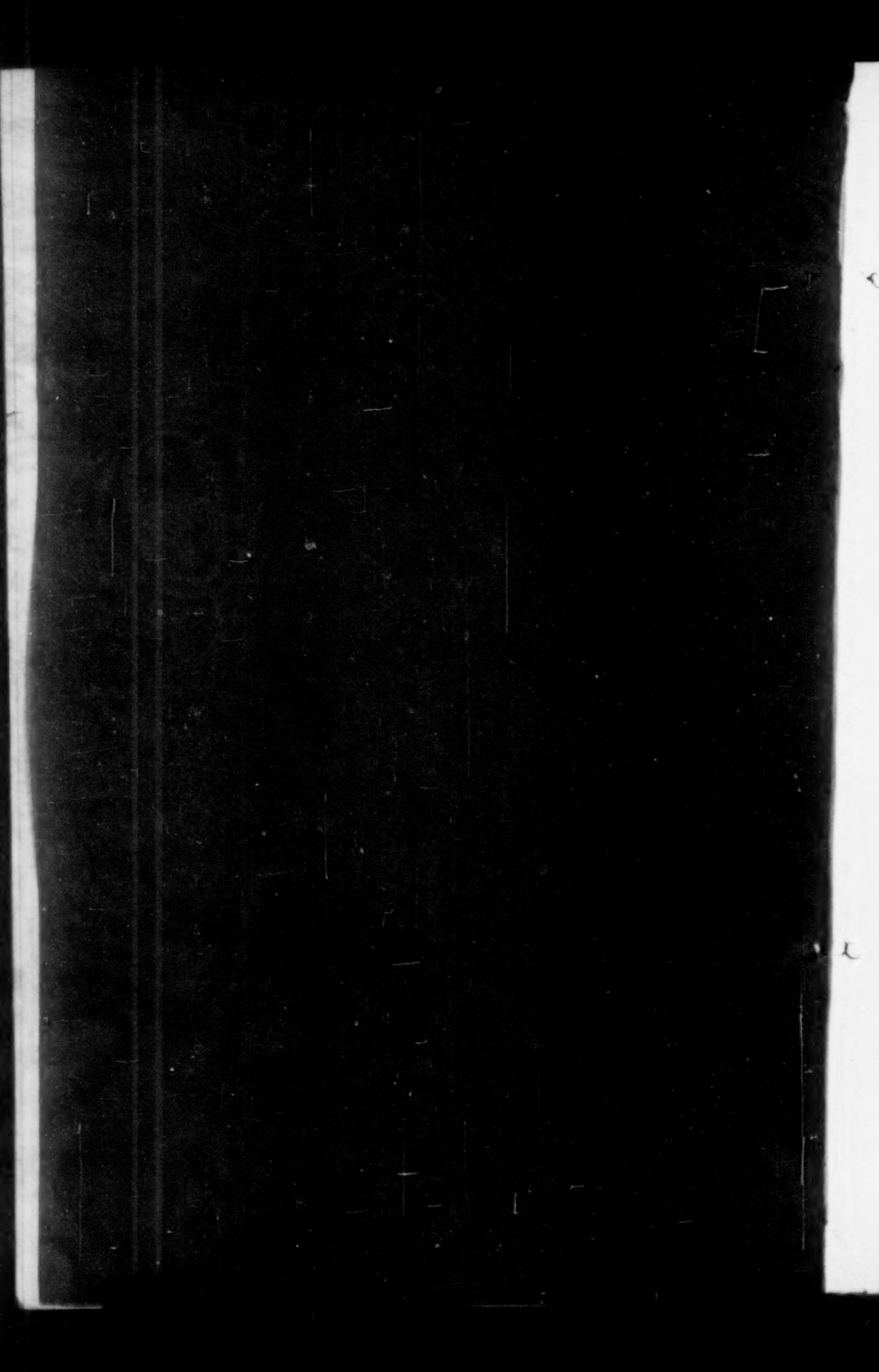
In the Supreme Court of the United States.

DECEMBER TERM, 1870.

THE UNITED STATES, *Appellants*,
vs.
JOHN H. RUSSELL. } No. 220.

Appeal from the Court of Claims.

BRIEF FOR THE THE UNITED STATES.



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vs.
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Appeal from the Court of Claims.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This was a petition for compensation for the seizure and use of three steamers belonging to the claimant, by the military authorities. The first was the steamer "J. H. Russell," which was taken by the assistant quartermaster of the United States army at St. Louis, on the 2d of October, 1863, under the following letter: "Captain of Steamer J. H. Russell: "SIR: Imperative military necessity requires that you make no arrangements for private freight without first consulting this office, and obtaining permission in writing so to do."

The steamer was detained in the service of the United States in pursuance to this order, being used in the transportation of Government freight from the 2d of October until the 20th of November, 1863.

The second was the steamer "Liberty," the captain of which, on the 2d of September, 1864, received notice from the assistant quartermaster, that "imperative military necessity requires the services of your steamer for a brief period. Your captain will report at this office at once in person, first stopping the receipt of freight, should the steamer be so doing."

In pursuance of this order, said steamer was taken into the service of the United States, and was engaged in the service for twenty-six days. The steamer was subsequently again taken into the service of the United States at New Orleans, under orders from an assistant quartermaster in the Army.

The third steamer was the "Time and Tide," which was taken into the service of the United States, in pursuance of a military order issued by an assistant quartermaster in the United States Army at New Orleans, on the 21st of March, 1864, and continued in the service of the United States in pursuance of such order for the period of sixty days.

The court find, "That during the time each of said steamers was in the service of the United States, as hereinbefore stated, they were in command of the claimant, or of some person employed by him, subject to his control and under his pay.

"That in the case of each of these steamers, at the times when the same were respectively taken into the service of the United States, the officers acting for the United States did not intend to 'appropriate' these steamers to the United States, nor even their services; but they did intend to compel the captains and crews with such steamers to perform the services needed, and to pay a reasonable compensation for such services, and such was the understanding of the claimant; and that each of said steamers, so soon as the services for which they were respectively required had been performed, were returned to the exclusive possession and control of the claimant; and that neither of them were seized by the military for such service in consequence of the violation by either of them of any law of Congress, or of any regulation relating to commercial intercourse."

The court, upon these facts, decided, as a conclusion of law, that there was not such an "appropriation" of the claimant's property as prohibited the court from taking jurisdiction of the case under the act of July 4, 1864, but that there was such an employment and use of the claimant's property in the service of the United States as raises an implied promise on the part of the United States to reimburse the claimant for the money expended by him for and on behalf of the United States, and also a fair and reasonable compensation for the services of the claimant and for the services of said steamers.

Judgment was accordingly rendered against the

United States for the sum of $41,355 33, and from that judgment the United States appeal, and assign as error that, under the act of July 4, 1864, section 1, (13 Statutes at Large, 381) the Court of Claims had no jurisdistion of the claim of the appellee against the Government.

ARGUMENT.

The language of the section above referred to is as follows:

"That the jurisdiction of the Court of Claims shall not extend to, or include, any claim against the United States growing out of the destruction, or appropriation of, or damage to, property by the army or navy, or any part of the army or navy, engaged in the suppression of the rebellion, from the commencement to the close thereof."

The construction put upon this section by the court is decisive of the present question In the language of Mr. Justice Field: "The term 'appropriation' is of the broadest import; it includes all taking and use of property by the Army or Navy, in the cause of the war, not authorized by contract with the Government."

Filor *vs.* United States, 9 Wallace, 45, 49.

That case was a temporary occupation of real property by the Quartermaster's Department, under a lease which was held to be invalid.

The subsequent return of the property did not render the action of the Quartermaster's Department any the less an appropriation. In the analogous case of tro-

ver, the action would have lain at the moment of the taking, and the subsequent return of the steamer would not have defeated the action, but only mitigated the plaintiff's damages.

Vandrink *vs.* Archer, 1 Leon., 221, 223.

Murray *vs.* Burling, 10 Johns., 172.

Lucas *vs.* Trumbull, 15 Gray, 306.

The joint resolution of December 23, 1869, (16 Statutes at Large, 368,) only construes the act of February 21, 1867, (14 Statutes at Large, 397,) in regard to the settlement of claims for steamboats used by the Government during the war, and does not touch, or pretend to touch, the question of the department by which they shall be settled.

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